

ORIGINAL**SMITH & LOWNEY, P.L.L.C.**

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April 1, 2005

To All Addressees Via Certified Mail – Return Receipt Requested

Julie Collins, Complex Manager
Dan Davies, Hatchery Manager
Leavenworth National Fish Hatchery
12790 Fish Hatchery Road
Leavenworth, WA 98826

Matthew J. Hogan, Acting Director
United States Fish & Wildlife Service
1849 C Street, NW
Washington, DC 20242

Secretary Gail Norton
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Re: **NOTICE OF INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT**

Dear Secretary Norton, Acting Director Hogan, Ms. Collins, and Mr. Davies:

This letter is to provide you with sixty days' notice of Washington Trout's intent to sue you and your agencies (collectively, the "Hatchery" herein) under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for violations occurring at the Leavenworth National Fish Hatchery, 12790 Fish Hatchery Road, Leavenworth, WA 98826. Washington Trout, P.O. Box 402, Duvall, WA 98019, (425) 788-1167, is represented by the undersigned to whom any correspondence related to this matter should be directed at the letterhead address.

I. Unpermitted Discharge

You have violated and continue to violate the Clean Water Act by discharging pollutants to navigable waters without a valid National Pollutant Discharge Elimination System. See 33 U.S.C. §§1311(a) and 1342. Continuously and on every day during the past five years, the Leavenworth National Fish Hatchery has discharged various pollutants, including hatchery process waste water and cleaning effluent, both of which contain pollutants including but not limited to

suspended solids, settleable solids, chemicals used for disinfection¹, fish fecal matter, uneaten fish food², nitrogen, phosphorus, disease control chemicals³, antibiotics, pathogens, portions of fish carcasses, and live fish to Icicle Creek via the following outfalls: 1) main Hatchery discharge of approximately 42 cfs from a square concrete outfall structure with an open top covered by metal grating discharging just below the spillway adjacent to the Hatchery; 2) pollution abatement pond discharge of approximately .5 to 5 cfs from a pipe approximately 200 feet below the spillway; and 3) discharge for release of smolts of approximately 3 to 4 cfs from a culvert (approximately two feet in diameter) approximately 50 to 60 feet upstream of the pollution abatement pond discharge.⁴ Icicle Creek is itself navigable waters under the Clean Water Act, and is tributary to the Wenatchee River, which is tributary to the Columbia River, both also navigable waters.

These discharges are made without valid NPDES permit coverage. NPDES Permit No. WA-000190-2 was issued by the United States Environmental Protection Agency for Hatchery discharges on December 30, 1974 (the "1974 permit"), but that permit expired by its own terms on August 31, 1979. Under the Clean Water Act, NPDES permits can be issued only for five-year terms and, therefore, the 1974 permit cannot provide coverage after its expiration date. 33 U.S.C. § 1342(a)(3) and (b)(1)(B). To the extent that EPA purported to extend coverage under its regulations, such regulations are inconsistent with the express provisions of the Clean Water Act, and cannot continue the effectiveness of an expired NPDES permit for an extended period of time. Furthermore, the Hatchery failed to submit a complete application for permit renewal at least 180 days before the August 31, 1979, expiration date of the 1974 permit as required by the EPA regulation on permit effectiveness continuation then in effect. 40 C.F.R. § 122.12 (1979); 40 C.F.R. § 122.5 (1980). The Hatchery did not submit an application for permit renewal until November 12, 1980, more than a year after the expiration of the 1974 permit.

¹ Disinfection chemicals discharged may include any of the following: chlorine, bromine, iodine, hypochlorite, iodophor, MS-222, quaternary ammonia, sodium thiosulfate, Aquashade, LLMO, chlorhexidine, lime type-S, and others.

² Discharged fish food may be contaminated with additional pollutants including DDT and DDE.

³ Disease control chemicals discharged may include any of the following: Amoxicillin, Terramycin, epsom salts, Erythromycin, Romet 30, Florfenicol, penicillin, Lincomycin, Albuterol, Clindamycin, Vibrio Vaccine, trimethoprim-sulfadiazine, Chlortetracycline, Tylosin, Fumagillin, Cephalexin, Benzocaine, Sulfamethoxazole (Albon), gonadotropin releasing hormone, Isoeugenol (Aqui-S), Calcein, BKD vaccine, Flavobacterium Columnare B vaccine, acetic acid, buffered iodophor, Chloramine-T, Formalin, hydrogen peroxide, potassium permanganate, sodium chloride, Diquat, citric acid, copper sulfadate, and others.

⁴ Discharges from the third outfall occurs only intermittently during the spring. The first two discharges are continuous and daily.

II. Alternative Allegations – Violations of 1974 Permit

If the 1974 permit is deemed to continue to provide effective coverage for the Hatchery's discharges, Washington Trout alleges that the Hatchery has violated and continues to violate the conditions of the 1974 permit as described below.

A. Monitoring Violations

Part I, Condition A.2. of the 1974 permit identifies final effluent limitations and monitoring requirements. It specifies the sample type, frequency, and analyses required. It requires a daily measurement of the total effluent flow, a monthly composite sample for suspended solids from the total effluent, a monthly grab sample for suspended solids from the total effluent, twice monthly grab samples for settleable solids from the total effluent, twice monthly grab samples for suspended solids from cleaning effluent, and weekly grab samples for settleable solids from cleaning effluent. "Composite sample" is defined by Part I, Condition C.3.c. as "a minimum of four (4) grab samples collected not less than two (2) hours apart during daylight." Part I, Condition C.3.c. further specifies that "[w]hen sampling two or more outfalls, each grab sample must be sized in proportion to the flow being sampled before combining with the other samples." Part I, Condition C.4. directs that "[t]est procedures for the analysis of pollutants shall conform to regulations published pursuant to Section 304(g) of the [Clean Water] Act" The Hatchery has violated this condition by failing to perform any of this required sampling and analysis, in the manner specified by these conditions, from five years ago to the present.

B. Reporting Violations

Part I, Condition C.2. of the 1974 permit requires that monitoring results be summarized each month on a Discharge Monitoring Report ("DMR") form and submitted quarterly to the USEPA, with a postmark no later than the 28th day of the month following the completed quarterly reporting period. The Hatchery has violated this condition by failing to submit any of the required DMRs to USEPA on a timely basis or at all from five years ago through the present.

C. Recording of Results

Part I, Condition C.5. of the 1974 permit requires that, for each measurement or sample taken pursuant to the requirements of the permit, the Hatchery shall record "a. The exact place, date, and time of sampling; b. The dates the analyses were performed; c. The person(s) who performed the analyses; d. The analytical techniques or methods used; and e. The results of all required analyses." The Hatchery has violated this condition by failing to record all of the required information for any measurements or samples taken, or required to be taken, pursuant to the requirements of the permit from five years ago through the present.

D. Records Retention

Part I, Condition C.7. of the 1974 permit requires that, "[a]ll records and information resulting from the monitoring activities (sic) required by this permit including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years" The Hatchery has violated this condition by failing to retain all of the records and information resulting from monitoring activities required by the permit, including those records that should have been generated but for the violations described in this notice of intent to sue, as required.

The above-described violations reflect only what information currently available to Washington Trout indicates. These violations are ongoing. Washington Trout intends to sue for all violations, including those yet to be uncovered and those committed subsequent to the date of this notice of intent to sue.

Washington Trout will seek injunctive relief to prevent further violations and to remediate past harms under Sections 505(a) and (d) of the CWA, 33 USC § 1365(a) and (d), and such other relief as is permitted by law, including the imposition of civil penalties. Also, Section 505(d) of the CWA, 33 USC § 1365(d), permits prevailing parties to recover costs including attorney's fees.

Washington Trout believes that this NOTICE OF INTENT TO SUE sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against each of you and the Hatchery under Section 505(a) of the Clean Water Act for violations.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations in this letter and settlement terms. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By: 

Richard A. Smith

cc: Steve Johnson, Administrator, U.S. EPA
Ron Kreizenbeck, Acting Administrator, Region 10 U.S. EPA
Jay Manning, Director, Washington Department of Ecology